Indian Law Outline
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I. The Development of Modern Federal Indian Law

A. 1492-1822: Indian Nations are Autonomous Sovereigns

(1) Historical Developments

- Indian nations are still, for the most part, possessed and in full control of their territories and resources.

- The French, English, Spanish, and Dutch enter into treaties of commerce and military alliances with Indian nations as independent sovereign nations.

- During the American Revolution, the colonies and Great Britain enter various military alliances with Indian Nations. Indian Nations fight on both sides of the conflict.

(2) Legal Developments

- The idea develops that Indian peoples, as non-Christians and non-farmers (despite the fact that many indigenous cultures throughout the hemisphere engaged in intensive agriculture), have lesser or no legal rights to their land and territories. The **Doctrine of Discovery** is developed, which posits that the first European Nation to discover [non-Christian] lands acquires legal title to those lands.

- After the American Revolution, the U.S. Constitution, through its Commerce and Treaty Clauses, vests the federal government, and the federal government alone (not private citizens, not states, not foreign governments), with the power to enter into commerce and make treaties with the Indian Nations. This is codified and reaffirmed through the ***Trade and Intercourse Acts*, 25 U.S.C. § 177**. States have no authority to enter into treaties with Indian Nations, to purchase or take Indian lands, or to engage in unregulated commerce with Indian Nations.

- Indian Nations are not, during this era, considered part of the United States governmental framework, although they are considered to be under the exclusive political sphere of influence of the federal government.

[1] The views expressed herein are those of the author and do not necessarily reflect any official position of the State of Montana. This outline is intended to assist state legislators and employees in obtaining a basic understanding of federal Indian law and to spot Indian law issues in their work with Tribes and Tribal members. Federal Indian law is in a constant state of flux so any use of this outline should be accompanied by consultation with an attorney with expertise in this area. This outline does not constitute legal advice.

B. 1823 – 1886: The Federal Government Expands its Authority over Indian Nations

(1) Historical Developments

• The westward expansion of settlers takes place pursuant to the idea of "Manifest Destiny" – a divine right to establish an agrarian nation from sea to sea.

• To clear the way for agrarian settlement, some Indian Nations are forcibly removed (e.g., the Cherokee Nation), some Indian Nations are militarily defeated (e.g. Apache, Nez Perce), and some Indian Nations defeat or militarily stalemate U.S. forces (e.g., Seminole).

• Smallpox, the elimination of the buffalo, and in some cases military defeat or stalemate force many Indian Nations to engage in treaty-making with the United States. Pursuant to these treaties, Indian Nations cede vast territories to the U.S. federal government in exchange for smaller areas of land (reservations), within which they have been promised they can live in undisturbed peace as Indian peoples.

(2) Legal Developments

• During this era, the U.S. Supreme Court develops the foundational legal theories governing the relationship between Indian Nations, the federal government, and state governments in three cases known as the "Marshall Trilogy": ***Johnson v. M'Intosh*, 2 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)**. The core legal holdings are as follows:

- Indian Nations possess attributes of sovereignty, but they are not fully sovereign nations like France or Germany. Rather, they are "**domestic dependant" nations**.
- "Domestic dependant" nations, by virtue of the Doctrine of Discovery, do not own legal title to their lands, but they do have a right to use and occupy their lands. Legal title is vested in the United States federal government, but that title is subject to the right of the Indian Nations to use and occupy their lands. Domestic dependant Indian Nations may only cede, sell or relinquish the lands they use and occupy to the U.S. federal government. They may not cede, sell or relinquish the lands they use and occupy to individuals, to states, or to foreign governments.
- The relationship between the federal government and domestic dependant Indian nations is as between a **guardian and a ward**. The federal government has an obligation to protect and act in the best interests of the Indian Nations.
- Within the boundaries of their reservations, domestic dependant Indian Nations have complete governmental control based upon their inherent sovereign authority, subject only to acts of Congress and treaties prescribing the bounds of their authority. State laws have no effect within Indian reservations. ***See also*, *Ex Parte Crow Dog*, 109 U.S. 556 (1883)**(tribes have jurisdiction over major crimes between Indians on reservations).

• In 1871, the federal government ends the practice of making treaties with Indian Nations, although it still engages in negotiations with Indian governments regarding land cessions.

• Between 1871 and 1887 the federal courts solidify federal control over Indian reservations. In the case of ***U.S. v. Kagama*, 118 U.S. 375 (1886),** the U.S. Supreme Court held that Congress had the power to enact the Major Crimes Act, which establishes a system of criminal laws on reservations. In justifying this extension of federal power and jurisdiction over matters of internal tribal governance, the Court stated: "[The power of the federal government to extend its authority over tribal criminal matters] must exist in [the federal] government, because it has never existed anywhere else, because the theatre of its exercise is within the geographic limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

C. 1887 – 1933: The Federal Government Breaks Up Indian Reservations and Attempts to Assimilate the Indian Nations

(1) Historical Developments

• During this era the first wave of settlers moves across the West and the federal government – desiring to free up treaty-protected Indian lands for successive waves of settlers – pursues a policy of dispossession and assimilation.

• U.S. policy during this period is to transfer treaty protected Indian lands to non-Indian settlers (allotment); officially making Indian peoples citizens of the United States; relocating Indian children to government-run or religious boarding schools, where they are forbidden to speak their language or practice their religions or cultures; forbidding Indian ceremonies on the reservation; instructing Indians in farming techniques. Traditional Indian governments become dormant during this period, as federal bureaucrats take over the management of reservations. Extreme corruption and incompetence marks this era of federal governmental management of Indian reservations.

• Large numbers of non-Indians move into the Indian reservations and settle on former Indian lands that have been moved from trust to fee simple status pursuant to the allotment and homestead acts. This wave of settlers results in a "checkerboard" pattern of Indian and non-Indian land ownership on reservations.

• The massive loss of Indian lands and resources impoverishes Indian tribes and impedes the development of reservations economies.

(2) Legal Developments

• In 1887, Congress passes the **General Allotment Act**, or "**Dawes Act**, " **25 U.S.C. § 331**. This act authorizes the federal government to divide Indian reservations into 160 acre plots. On plot of 160 acres is allotted per Indian family on the reservation, and any left-over lands are transferred to Non-Indians under the Homestead Act. The Indian allotments were not alienable or taxable for a period of 25 years, after which these lands became alienable and taxable. The ostensible purpose of the act was to teach Indian

people the value of private property and to turn them into farmers. By the time the allotment act was repealed in 1928, Indian reservation landholding went from 138 million acres to 48 million acres.

• In the case of ***Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)**, the Supreme Court announced that Congress has plenary authority over Indian Nations. Pursuant to this plenary authority, Congress may unilaterally break treaties with the Indian Nations in order to allot their reservations and give the land away to non-Indians. Indian Nations do not have recourse to the federal courts to remedy violations of treaties by the federal governments.

D. 1934 – 1945: The Federal Government Ends Policies of Assimilation and Devolves Authority over Reservations to Tribal Governments

(1) Historical Developments

• A 1928 government-sponsored report, written by Lewis **Meriam**, blasts the federal policies of dispossession and assimilation as failures. Not only had Indian peoples refused to be assimilated, federal policies had resulted in a massive loss of Indian resources, greatly deepened Indian poverty and done massive damage to Indian cultural life.

(2) Legal Developments

• In 1934, Congress passes the **Indian Reorganization Act (IRA), 25 U.S.C. § 461**, in response to the failure of assimilationist policies. Under the Act:

- Allotment of Indian reservations ends;
- Indian allotments are put into permanent trust status – not alienable or taxable;
- Indian Nations were allowed to establish governments or business committees, with constitutions, charters and by-laws, to take over reservation governance subject to the ultimate authority of the federal government.

• Under the IRA, 161 constitutions and 131 charters were adopted by Indian Nations. Typically, governing power is centralized in a tribal council, which functions both as the legislative and executive branch of government. Separate tribal courts with limited jurisdiction have also been established as part of many tribal governments. Strict separation of powers is not a requirement of the IRA.

E. 1945 – 1971: The Federal Government Pursues a New Policy of Assimilation by "Terminating" the Legal Existence of Certain Tribal Governments and Allowing the Extension of State Jurisdiction over Certain Reservations

(1) Historical Developments

• It is difficult to discern what historical developments led to the sudden reversal by the federal government of its previous policy of encouraging tribal self-government on reservations. During this period the county was gripped by government-sponsored anti-communist hysteria, as well as by the civil rights movement. One can speculate that the federal government's desire for internal stability in the face of perceived threats from

communism and the demands of racial minorities for civil rights contributed to the policy of legally terminating the existence of dozens of tribal governments and reservations.

(2) Legal Developments

• During the period, Congress passed dozens of acts terminating the existence of specific tribal governments and reservations. All told, 109 Indian governments were terminated, affecting 1,362,155 acres of land and 11,466 Indian people. Under these acts, Indian lands were sold, state legislative and taxation authority imposed, federal programs discontinued, and tribal sovereign authority ended. These acts targeted specific tribes and did not repeal or modify other existing tribal governments.

• Congress passes **PL 83-280, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26; 28 U.S.C. § 1360,** in 1953. This law extends elements of state criminal and civil jurisdiction over certain reservations. In Montana, PL-280 extends elements of state jurisdiction over the Flathead Reservation only. In 1993, under amendments to PL-280, the state retrocedes certain jurisdictional powers back to the Salish-Kootenai tribal government.

F. 1971 – Present: The Modern Era of Self-Determination

(1) Historical Developments

• As with previous attempts to assimilate Indian Nations, the policies of the termination era were a disastrous failure. The overall effect was another massive loss of Indian land and the transformation of self-sufficient tribes into state welfare dependants. Recognizing these failures, Congress reestablishes many of the tribes it had previously terminated, and many states retrocede the jurisdiction they had assumed under PL-280 to tribal governments.

• Congress embarked on a policy of encouraging tribal self-government, shifting the management of federal programs from the BIA to tribal governments, and creating tribally-run education systems.

• Successive Presidential administrations have affirmed a policy of protecting the integrity of tribal governments through the maintenance of federal-tribal government-to-government relationships.

• At the international level, the UN has adopted a "**Declaration on the Rights of Indigenous Peoples**," declaring standards for the protection of indigenous rights. International customary law is developing which recognizes the right of Indigenous Peoples to autonomy, self-government, and land ownership. These rights are understood as basic requirements for the continuation of indigenous cultures and existence.

• The U.S. Supreme Court is out of step with these developments. The general trend in the modern era is for federal courts to limit the jurisdiction of tribal governments, particularly with regard to non-Indians engaged in activities on the reservation. Because of federal court decisions, tribal governments have no criminal jurisdiction over non-Indians on reservations and tribal regulatory and taxation authority over non-Indian individuals and businesses on reservations is steadily shrinking. These decisions, rather

than providing clarity, are increasing the jurisdictional confusion on reservations and slowing the development of stable reservation governments and economies.

(2) Legal Developments

• Because of the Congressional policies of dispossession and assimilation, many Indian reservations now have "checkerboard" patterns of land ownership. Some lands are held in trust by the United States for Tribes and individual Indians and some lands are held in fee simple by non-Indians. The federal courts have created a complex jurisdictional web in which state governments, tribal governments, and the federal government have shifting zones of responsibility. A summary follows:

a. Tribal Governments

1. Civil Jurisdiction of Tribal Government and Courts

◦ Tribal governments have inherent jurisdiction to enact civil laws regarding the activities of tribal members within reservation boundaries. Tribal courts have jurisdiction to hear civil cases involving Indians occurring within reservation boundaries.

◦ Tribal governments and courts are presumed under federal jurisprudence to have limited or no authority over the activities of non-Indians on reservations, except when:

- Non-Indians have entered into a consensual relationship with the Tribe (usual this means a contractual or business relationship);
- When the conduct of non-Indians threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. ***Montana v. U.S.*, 450 U.S. 544 (1981).**

◦ Some examples:

- ***Strate v. A-1 Contractors*, 520 U.S. 438 (1997)** – Tribal courts cannot hear a civil suit between non-Indians regarding a traffic accident which occurred on a state highway within a reservation; tribal court jurisdiction and tribal legislative/regulatory jurisdiction are co-extensive;
- ***Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130 (1982)** – Tribes can tax non-Indian companies extracting minerals from Indian lands pursuant to long-term leases with the Tribe;
- ***Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)** – Tribes may tax non-Indians who buy cigarettes from Indian vendors located on trust land within a reservation;
- ***Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)** – Tribes cannot enact zoning ordinances in areas of the reservation that are so populated by non-Indians that the area has lost its "tribal character";
- ***Nevada v. Hicks*, 121 S.Ct. 2304 (2001)** – Tribal courts have no jurisdiction over cases arising from alleged violations of civil rights committed by state police officers on the reservation, when those officers committed those acts in pursuing an alleged off-reservation crime;
- ***Atkinson Trading Co. v. Shirley*, 215 S.Ct. 1825 (2001)** – A tribal government may not tax non-Indians staying in a non-Indian hotel on non-Indian land within the reservation;

• The federal government has expressly delegated to tribal governments some jurisdictional powers to enact and enforce specific federal environmental laws within reservations, including in some instances regulating the activities of non-Indians on free simple lands within reservation boundaries. *See, e.g.,* ***Clean Air Act*, 42 U.S.C. § 7601 (d)(2)(B)**.

• Tribal governments possess sovereign immunity from suit as an aspect of their inherent sovereignty. The federal government may waive tribal sovereign immunity through express statutory language. A tribal government may also waive sovereign immunity, through a contract clause for example.

2. Criminal Jurisdiction of Tribal Governments and Courts

◦ The criminal jurisdiction of tribal governments and courts is narrow:
▪ ***Oliphant v Suquamish Indian Tribe*, 435 U.S. 191 (1978)** – Tribal governments and courts have no criminal jurisdiction over non-Indians. Crimes committed by non-Indians on the reservation go to either state or federal court, depending upon the facts. IN some instances, tribal courts may have jurisdiction over crimes committed by Indians against non-Indians.
▪ Tribal governments and court may enact and enforce laws regarding misdemeanor and victimless crimes involving Indians on the reservation.
▪ Major crimes involving Indians, like murder or rape, go to federal court.

b. Federal Government

1. Civil Jurisdiction of the Federal Government

◦ The federal government, pursuant to the modern era's policy of encouraging tribal self-government, has decreased its intrusive management of reservations. Instead, tribal governments manage federal programs on reservation, run federal environmental programs, and manage the affairs of Indians on the reservation. In some instances, the federal government may devise a comprehensive regulatory scheme for managing some Indian resource (for example, timber management, **25 U.S.C. §§ 405, et seq.)**, or for promoting good tribal governance (for example, the **Indian Civil Rights Act, 25 U.S.C. §§ 1301, et seq.**) but the federal government still generally looks to tribal governments to enact and enforce such schemes. One area in which the federal government has failed is in the management of Indian monies from the lease of allotments to non-Indians. Federal mismanagement of these Individual Indian Monetary (IIM) accounts has led to a massive law suit in federal court.

2. Criminal Jurisdiction of the Federal Government

◦ The federal courts have jurisdiction over major crimes committed by Indians on the reservation, and over crimes committed by non-Indians against Indians on the reservation. In some instances involving non-Indians state jurisdiction is concurrent.

c. State Government

1. Civil Jurisdiction of State Governments

◦ State laws generally are not applicable to Indians on a reservation except where Congress expressly provides that state law shall apply.

- ***McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973)** – State cannot tax the income of individual Indians living on the reservation when that income is derived from within the reservation. Congress has not allowed for such taxation, and such taxation interferes with Indian self-government.
- ***Flat Center Farms, Inc. v. MT Dep't of Revenue*, 2002 MT 140 (2002)** – Tribally chartered and owned corporation, operated by Indians and doing business within boundaries of the reservation, is not subject to state corporate license tax.

◦ In determining whether State laws apply to the activities of non-Indians on a reservation, a particularized inquiry into the interests of the federal, state and tribal sovereigns is required. Generally, State law applies to the non-Indians unless it is preempted by federal law, or if it infringes impermissibly upon the right of reservation Indians to make their own laws and be ruled by them.

- ***White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)** – Arizona may not tax a non-Indian corporation doing business with a tribe on its reservation because there exists extensive federal law regulating logging on the reservation, because the tax would interfere with federal policy goals, and because the state cannot justify the tax – thus, the tax is preempted by federal law.
- ***Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)** – A state may impose a tax on a non-Indian corporation extracting oil and gas from Indian lands because the federal regulatory scheme applicable to such activity can be construed as allowing state taxation, provided it is non-discriminatory taxation;
- ***Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)** – A state may tax non-Indian buyers of cigarettes on Indian reservations because there is no federal scheme which preempts such a tax, and the resulting double tax does not undermine Indian self-government because the value of the cigarettes is generated off the reservation and the non-Indian buyers are not recipients of tribal services.

2. Criminal Jurisdiction of State Courts

◦ State courts have exclusive jurisdiction over crimes committed between non-Indians on a reservation.

II. Specific Issues of Concern in State – Tribal Relations

A. State-Tribal Cooperative Agreements Act, MCA §§ 18-11-101, et seq.

• The Cooperative Agreements Act is the basic state law governing state-tribal agreements for the provision of services on reservations, and for the sharing of tax revenues.

• The Act allows Tribes and state public agencies (including municipalities, counties, school districts and any agency or department of the State), to enter into inter-governmental agreements to (1) perform any administrative service, activity or undertaking that a public agency or a tribal government is authorized by law to perform; or (2) to assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public agency and a tribal government and to share or refund the revenue from the assessment and collection.

• Agreements entered into under the Act must be approved by the Attorney General. Agreements may not change the underlying jurisdictional authority of the parties, unless expressly authorized by Congress.

B. Sovereign Immunity

• Tribes, like states, possess sovereign immunity from suit. Congress, or a tribe itself, may waive a tribe's immunity from suit. Tribal sovereign immunity does not prevent suit by the United States.

◦ ***Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)** – tribe entitled to sovereign immunity from suits on contracts, regardless of whether those contracts involve governmental or commercial activities or whether they concern conduct on or off a reservation

◦ ***C&L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)** – tribe can waive sovereign immunity through arbitration provision of an off-reservation services contract, and consent to suit in state court.

◦ ***Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006)** – "sue and be sued" clause in enabling clause of Blackfeet Housing Authority is a clear and unambiguous waiver of tribal sovereign immunity.

◦ ***Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997)** – Just as tribes are immune from suit in state court absent a Congressional or tribal waiver, the state is immune from suits in tribal court because its constitutional and statutory waiver of immunity is limited to state courts, and does not subject the state to tort actions in tribal court.